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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

HEZZACK DANIELS et al., Plaintiffs and Appellants, v. RECOLOGY, INC., et al., Defendants and Appellants.	A141999 (City & County of San Francisco Super. Ct. No. CGC-10-502563)
TIMON HOWARD et al., Plaintiffs and Appellants, v. RECOLOGY, INC., et al., Defendants and Appellants.	(City & County of San Francisco Super. Ct. No. CGC-11-508886)

This is an appeal from judgment in an employee class action lawsuit brought against defendants Recology, Inc. and Recology San Francisco, Inc. (hereinafter, Recology), a garbage and recycling collecting company with two facilities in San Francisco, one located at Pier 96 and the other at 501 Tunnel Avenue. The lawsuit accuses Recology of violating the privacy and other rights of certain employees engaged as "Classifiers" at the Pier 96 facility or "Material Handlers" at the 501 Tunnel Avenue facility in connection with Recology's administration of a random drug testing program. The trial court dismissed all remaining causes of action and entered judgment for

Recology after sustaining its demurrers and granting its motions for summary adjudication. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are two certified classes consisting of employees working in San Francisco for Recology in one of two job classifications: "Classifiers" at the Pier 96 facility, represented by plaintiff Daniels, or "Material Handlers" at the 501 Tunnel Avenue facility, represented by plaintiffs Hunter and Smith. The Pier 96 facility primarily receives recyclable material collected from the blue containers of San Francisco residences and businesses, as well as the public at large. The Classifiers at this site are tasked with sorting recyclable material received from long-haul tractor-trailers, roll-off trucks, recycling trucks and other vehicles; manually inspecting and weighing recyclables received in the "buyback" area; and continuously cleaning the warehouse, parking lot and dock as vehicles enter, drop off material and exit the facility. The 501 Tunnel Avenue facility, in turn, receives demolition, construction and organic waste in addition to recyclable material from the 800 or more vehicles entering daily. Tasks performed by the Material Handlers at this site include sorting construction and demolition material; assisting in unloading waste; cleaning around the wood grinder, under sort lines and outside the facility; and operating a polystyrene foam grinder, hand tools (including hammers, cutters, grinders, and wrenches), and forklifts.

Due to the risks posed by these types of tasks, both Classifiers and Material Handlers wear safety gear, which may include hard hats, ear protection, safety glasses, dust masks, gloves and steel-shank work boots, in order to protect against injury from any hazardous material present among the recyclables. Such hazardous material, in turn, may include batteries, solvents, drain cleaners and other noxious substances. The employees also risk injury from their involvement with vehicle traffic and conveyor belts; from improper lifting of materials (including waste and debris); and from working with or near fork lifts or front-end loaders. There are monthly safety meetings to address these and other safety issues. Workplace injuries and the resulting loss of workdays are not uncommon.

On November 27, 2013, the operative complaint—the third amended consolidated complaint—was filed, asserting the following claims: drug testing, an unfair business practice under Business and Professions Code section 17200 (4th cause of action); disability accommodation discrimination in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA); violation of privacy rights guaranteed by the California Constitution (Cal. Const., art. I, § 1) (7th cause of action); forced medical testing in violation of FEHA (9th cause of action); failure to prevent a FEHA violation (10th cause of action); retaliation in violation of FEHA (11th cause of action); retaliation in violation of Labor Code section 1102.5 (12th cause of action); violations of rights under the Bane Act (Civ. Code, § 52.1) by threat, intimidation and coercion (13th cause of action); and declaratory and injunctive relief (14th cause of action).[1]

These claims arise from a random drug testing program initiated by Recology in 1995 pursuant to its substance abuse policy. At first, this program applied only to employees subject to Department of Transportation (DOT) regulations, including its truck drivers. Plaintiffs did not qualify as DOT-regulated employees, but were members of the Teamsters union (hereinafter, union). In May 2006, Recology and the union entered into two similar collective bargaining agreements (hereinafter, CBA) governing

[1] Plaintiff Daniels filed his own complaint on August 12, 2010, asserting an individual claim for disability discrimination and class claims for wage and hour violations. Recology removed the case to the United States District Court for the Northern District of California on September 15, 2010, arguing his claims were preempted under section 301 of the Labor Management Relations Act (29 U.S.C. § 185(a)) (LMRA). In federal court, plaintiff Daniels filed a motion to remand the action to state court, which was granted on December 20, 2010.

Plaintiffs Howard, Hunter, Johnson and heirs of decedent Robert Dorton thereafter filed a separate complaint on March 7, 2011, asserting claims for, among other things, invasion of privacy, unlawful medical testing in violation of FEHA, unfair competition, discrimination and police code violations. These complaints were thereafter consolidated into a single action and the wage and hour violation allegations dismissed. The first amended consolidated complaint, filed September 17, 2012, added as new putative class representatives Daniels, Orozco, and Smith. Racial discrimination allegations were also thereafter dismissed.

employee wages, hours and working conditions. One CBA provision, section 26, incorporated by reference Recology's substance abuse policy, which provided: "All DOT-regulated drivers and Employees performing safety sensitive job functions are subject to random alcohol and/or drug testing before, while, or just after they cease to perform such functions." This policy further provided for suspension of a DOT-regulated employee who tests positive, with the right to reinstatement without loss of seniority upon execution of a "return to work" agreement. Disputes regarding interpretation or enforcement of the CBA were subject to mandatory binding arbitration at the request of either party.

In 2009, Recology and the union began discussions regarding expanding the substance abuse policy to include non-DOT-regulated employees (like plaintiffs) as a means to ensure these employees received the same contract rights to rehabilitation and reinstatement as DOT-regulated employees. At the time, Recology's San Francisco-based employees were subject to a municipal police code provision barring employers from subjecting employees to random drug testing unless authorized by a CBA. (S.F. Police Code, § 3300.) Thus, on May 19, 2009, Recology and the union entered into a letter of understanding (LOU) that accomplished just that—equalizing the policy as to both DOT- and non-DOT-regulated employees. Specifically, the LOU provides in relevant part: "[S]ince all the [job] positions covered by these [CBA's] implicate safety concerns, Section 26 of [the CBA's] is intended to adopt and apply the drug and alcohol testing requirements of the Federal Motor Carrier Safety Administration [(FMCSA)] to all employees subject to these Agreements, including any employees performing work that the [DOT] would not deem 'safety sensitive' within the meaning of the FMCSA and to conform the testing provisions of the Company's Substance Abuse Policy to the FMCSA procedures related to substance abuse testing."

All union members were thereafter informed in writing that, per the LOU, Recology's substance abuse policy would extend to union employees holding safety-sensitive jobs, including plaintiffs, in 60 days. Thus, on October 13 and 14, 2009, two "all hands" meetings were held—and attended by each plaintiff—wherein a third party

administrator, Concorde, Inc. (Concorde), explained to union members the drug testing procedures mandated under Recology's policy that would soon apply to them.

In November or December 2009, random drug testing at Recology began, with Concorde making the random selections and administering the tests and two independent laboratories collecting and analyzing participants' urine samples. With respect to failed tests, Concorde contacted the participant and requested a medical explanation. If none was offered, the participant was then suspended with the opportunity for full reinstatement if the participant signed a return to work agreement and promised to complete a drug treatment program and to submit to follow-up drug tests after returning to work.

Plaintiffs, except Howard, were among 22 employees failing drug tests during Concorde's first 18 random selections.[2] In February 2010, the union filed grievances on behalf of each employee testing positive. On February 15, 2011, the union and Recology entered into a negotiated grievance resolution calling for reinstatement of those employees suspended on the basis of an initial positive test (plaintiffs Smith and Daniels) or refusal to test (plaintiff Johnson). No grievance was filed on behalf of plaintiff Howard with respect to his selection for testing.

In late 2012, the union and Recology agreed to renewed CBA's, which contained a modified, albeit similar, provision governing drug testing that reduced the suspension

[2] Plaintiff Johnson, after being selected for testing, refused to submit a urine sample. Per the substance abuse policy, his refusal to test was deemed a failed test. Daniels, in turn, failed to submit a urine sample of sufficient volume to be accurately tested, and was likewise deemed to have failed the test. Plaintiffs Orozco and Smith tested positive and admitted using illegal drugs. Johnson, Orozco and Smith thereafter were suspended and asked to sign return to work agreements, per the policy, which included terms such as agreeing to counseling and submitting to future unannounced drug tests. Orozco was later terminated after failing a second drug test, and Johnson was terminated for refusing to participate in the drug treatment program recommended by his substance abuse counselor. Only plaintiff Howard tested negative, but was later terminated for unrelated misconduct.

period for a first violation to one month from three. Union members thereafter ratified these renewed CBA's, and they were thus given full force and effect.

Based primarily on these CBA's, Recology filed a series of motions seeking dismissal of plaintiffs' claims. The trial court first considered Recology's motion for summary adjudication of plaintiffs' privacy claims (4th and 7th causes of action) and, in its October 2, 2013 order to grant this motion, accepted Recology's argument that said claims were preempted under section 301 of the LMRA (29 U.S.C. § 185(a)). On November 13, 2013, the trial court sustained Recology's demurrer with leave to amend the 13th cause of action for violation of the Bane Act (Civ. Code, § 52.1) on the ground that said cause arises from the same preempted privacy claims rejected by the court on October 2, 2013.

Pursuant to stipulation, the trial court also ruled as a general matter that all court rulings made against the individual claims in the 4th, 7th, 9th, 13th and 14th causes of action would apply equally to the certified class claims and that, going forward, all court summary adjudication rulings would be binding on all class members. The trial court further ruled that any cause of action asserting invasion of privacy would be governed by the court's October 2, 2013 order granting summary adjudication on preemption grounds and, thus, should be deemed dismissed with prejudice. Finally, the parties stipulated that, if the court granted the pending summary adjudication motions, judgment would be entered in Recology's favor and against all plaintiffs, individual and class.

On March 28, 2014, the trial court did just that—summarily adjudicated all remaining claims in Recology's favor and entered judgment of dismissal against all plaintiffs, individual and class. This appeal, as well as Recology's protective cross-appeal, followed.

DISCUSSION

Plaintiffs challenge the trial court's dismissal of the following causes of action: unfair business practice, drug testing in violation of Business and Professions Code section 17200 (4th cause of action) (class and individual); disability accommodation discrimination in violation of FEHA (5th cause of action) (Daniels); violation of privacy

rights guaranteed by the California Constitution (7th cause of action) (class and individual); forced medical testing in violation of FEHA (9th cause of action) (class and individual); failure to prevent a FEHA violation (10th cause of action) (class and individual); retaliation in violation of FEHA (11th cause of action) (Daniels and Hunter); retaliation in violation of Labor Code section 1102.5 (12th cause of action) (Daniels and Hunter); violations of rights under the Bane Act by threat, intimidation and coercion (13th cause of action) (class and individual); and declaratory and injunctive relief (14th cause of action) (class and individual). We address each challenge in appropriate order below.

I. Invasion of Privacy Claims: 4th and 7th Causes of Action (Class and Individual).

Plaintiffs argue the trial court erred in ruling on summary adjudication as a matter of law that their privacy claims based on the California Constitution, article I, section 1, Business and Professions Code section 17200 (section 17200) and San Francisco Police Code section 3300 were preempted by section 301 of the LMRA (29 U.S.C. § 185(a)) (section 301) because their resolution requires interpretation of the parties' CBA's[3] and the May 2009 LOU.[4] According to plaintiffs, the federal court found no federal

[3] Section 26 of the CBA sets forth the bargaining parties' drug policy as follows:

"The Employer's Substance Abuse Policy provides that employees who test positive pursuant to [DOT] guidelines shall receive a three (3) month suspension and, upon execution of a Return to Work Agreement, be reinstated to their position without loss of seniority.

"During the period that the person is suspended, the Employer will pay for COBRA (medical, dental, EAP) coverage provided that the employee has elected to accept COBRA coverage within the required time period.

"The parties reserve their right to re-open for negotiations this policy as law and regulations change."

[4] The LOU provides in relevant part: "The parties hereby agree that since all the positions covered by these Agreements implicate safety concerns, Section 26 of these Agreements is intended to adopt and apply the drug and alcohol testing requirements of the [FMCSA] to all employees subject to these Agreements, including any employees performing work that the federal [DOT] would not deem 'safety sensitive' within the

preemption after reviewing the record and hearing argument and, thus, returned the case to state court. It was thus prejudicial error, plaintiffs contend, for the trial court to find otherwise, and to effectively leave them without a judicial forum in which to litigate their claims. Plaintiffs further contend the trial court's disregard of the federal court's preemption decision violated the full faith and credit and collateral estoppel doctrines.

Recology disagrees, noting the federal court never considered much less resolved whether their class privacy claims were preempted. Rather, the federal court remanded to state court after concluding that individual plaintiff Daniels's wage and hour and disability discrimination claims were not preempted by federal law. Having reviewed the federal court's opinion, we agree with Recology on this point. As an initial matter, this appeal does not involve any individual wage and hour claims. Second, with respect to Daniels's disability discrimination claim, the federal court reasoned that, while the CBA's drug testing procedures were relevant, the particular dispute was "purely factual" and independent of the CBA given that "Daniels does not dispute whether Recology followed the CBA-mandated procedures." Accordingly, plaintiffs are mistaken in suggesting the preemption issues raised on appeal relating to the class and individual invasion of privacy claims have already been decided in their favor. We thus proceed to the issue at hand—whether the trial court correctly ruled the class privacy claims brought under the California Constitution, article I, section 1, and section 17200 are preempted by section 301.

The basic legal principles are not in dispute. "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " (*Caterpillar Inc. v. Williams* (1987) 482 U.S. 386, 394 (*Caterpillar*).) Section 301 has thus been "read to pre-empt state-court resolution of disputes turning on the rights of parties under collective-bargaining agreements." (*Livadas v. Bradshaw* (1994) 512 U.S.

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meaning of the FMCSA and to conform the testing provisions of the Company's Substance Abuse Policy to the FMCSA procedures related to substance abuse testing."

107, 114–115.) Further, the phrase "turning on the rights of the parties" means that resolution of the dispute depends on the understanding embodied in the CBA between the union and the employer. (*Id*. at pp. 124–125.) On the other hand, "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished, see *Lingle* [*v. Norge Division of Magic Chef, Inc*. (1988) 486 U.S. 399,] 413, n. 12 ('A collective-bargaining agreement may, of course, contain information such as rate of pay . . . that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled')." (*Id.* at p. 124.)

As expected, plaintiffs contend their California constitutional and statutory privacy rights, as implicated by Recology's drug policy, need not and should not be evaluated according to the terms of the CBA or the LOU, but rather according to the constitutional balancing test weighing their privacy interests against countervailing privacy and non-privacy interests. (See *Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 37 ["comparison and balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law"].) Plaintiffs rely on *Cramer v. Consolidated Freightways, Inc*. (9th Cir. 2001) 255 F.3d 683, 693 (*Cramer*), which holds: "A state law claim is not preempted under § 301 unless it necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute." In *Cramer*, the issue was whether plaintiffs' state privacy law challenge to their employer's use of concealed video cameras and audio listening devices to detect and prevent drug use by its employees was preempted under section 301. (*Id*. at p. 688.) The reviewing court held that it was not preempted, explaining that neither CBA provision "purports to have any bearing on secret spying on Consolidated's employees in company restrooms—no matter how well-intentioned Consolidated's alleged purpose may have been in doing so." (*Id.* at p. 694.) The reviewing court further pointed out: "Even if the CBA did expressly contemplate the use of two-way mirrors to facilitate detection of drug users, such a provision would be illegal under California law. Section 653n of the California Penal Code makes the installation and maintenance of two-way mirrors

permitting the observation of restrooms illegal without reference to the reasonable expectations of those so viewed." (*Id.* at p. 695.)

Our case clearly differs from *Cramer*. Indeed, plaintiffs cannot deny both the CBA and the LOU speak directly to the drug testing they challenge. Instead, plaintiffs try to distance themselves from the terms of the CBA and LOU by stressing that all class members held non-safety-sensitive positions and therefore were not bound by the DOT drug testing guidelines referenced in the CBA. As such, plaintiffs insist Recology should not be permitted to avoid constitutional scrutiny of their privacy infringements by relying upon federal preemption principles.

Plaintiffs' argument, however, disregards the fact that their union entered into a specific bargained-for exchange with Recology covering the subject of drug testing and including among the covered employees their two job classifications, Classifiers and Material Handlers, notwithstanding the degree of safety implicated by their positions. Recology directs us to the LOU, a binding contract between Recology and the union, stating that "all the positions covered by these [CBA's] implicate safety concerns," and "Section 26 of these [CBA's] is intended to adopt and apply the drug and alcohol testing requirements of the Federal Motor Carrier Safety Administration [FMCSA] to all employees subject to these [CBA's] . . . ."

Plaintiffs, in an apparent attempt to circumvent the effect of the LOU/CBA, rely upon *Smith v. Fresno Irrigation Dist.* (1999) 72 Cal.App.4th 147 (*Smith*) to dispute that their job positions were safety-sensitive. *Smith* does not assist them. There, the plaintiff challenged a ruling by the Fresno Irrigation District that he was employed in a safety-sensitive position subject to a substance abuse policy adopted by the district's board of directors. Under this policy, all employees working in safety-sensitive positions were required to take random tests for drugs and alcohol, with the list of positions deemed safety-sensitive left to management discretion. (*Id.* at pp. 151–152.) The plaintiff, after being found in violation of the substance abuse policy, challenged the constitutionality of his termination pursuant to this substance abuse policy. (*Ibid.*) Applying a traditional constitutional analysis, the reviewing court concluded the district's legitimate interest in

minimizing the risk of injury to its employees outweighed the plaintiff's privacy interests and, thus, that the drug test resulting in his termination was constitutionally valid. (*Id*. at pp. 166–167.)

These facts differ significantly from ours. At bottom, the policy at issue in *Smith* was not a product, as here, of the collective bargaining process. *Smith* is therefore not instructive here. The same is true for plaintiffs' case *Loder v. City of Glendale* (1997) 14 Cal.4th 846. There, the issue was whether *job applicants*, not union members, could be subjected to suspicionless drug testing as part of a mandatory preemployment medical exam. (*Id*. at p. 898.) *Loder*, like *Smith*, therefore has nothing to say about the issue at hand—whether their state constitutional and statutory invasion of privacy claims are subject to LMRA preemption.

Taking another track, plaintiffs argue the LOU that extends these DOT guidelines to union members with their job classifications was a "secret" agreement they never voted on or ratified. We, however, agree with Recology that plaintiffs' argument, lacking evidentiary support, does not undermine the trial court's ruling that their privacy claims are preempted section 301 claims. The relevant case law confirms these claims are governed by federal law, not state law, because, simply put, their resolution hinges on what Recology and the union bargained for when executing these contracts. (See *Caterpillar*, *supra*, 482 U.S. at p. 394 [section 301 preemption exists where claims are founded directly upon rights conferred in the CBA or claims are "substantially dependent on" interpretation of the CBA terms]; *Jackson v. Liquid Carbonic Corp.* (1st Cir. 1988) 863 F.2d 111, 119–122 (*Jackson*) [dismissal of state law invasion of privacy claims affirmed on preemption grounds where "the dimensions of appellant's cognizable expectation of privacy depend to a great extent upon the concessions the union made regarding working conditions during collective bargaining"]; cf. *Cramer*, *supra*, 255 F.3d at p. 696 [preemption doctrine not applicable where the CBA contained no provision relating to the surreptitious videotaping challenged by the plaintiffs in their state law invasion of privacy claim].) Accordingly, the trial court's preemption analysis was correct.

In reaching this conclusion, we acknowledge plaintiffs' insistence that " '§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.' " (*Cramer, supra*, 255 F.3d at p. 695.) While this general proposition is no doubt true, "drug testing . . . is not performed surreptitiously and—most importantly—is not illegal under state law." (*Id.* at p. 696 [finding covert restroom surveillance per se illegal under California privacy laws].) To the contrary, a wealth of case law reflects that drug testing is indeed a permissible subject of negotiated bargaining between labor and management. (E.g., *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 540 ["The interests and concerns of any employee subjected to a mandatory drug-testing policy are obvious. . . . Good faith pursuit of the bargaining process will require attention to these and other pertinent issues and may result in a policy serving the interests of both employer and employees"]; *Dykes v. Southeastern Pa. Transp. Authority* (3d Cir. 1995) 68 F.3d. 1564, 1570 ["even where a drug testing policy has been held to be constitutionally infirm, a public employee may not pursue a civil rights suit based upon that infirmity where his union and his employer agree to operate under that policy"]; *Utility Workers of America v. Southern Cal. Edison* (9th Cir. 1988) 852 F.2d 1083, 1086 ["To the best of our knowledge, . . . no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here"]; *Jackson*, *supra*, 863 F.2d at p. 120.)[5] Accordingly, for the reasons provided, we affirm the trial court's dismissal of the 4th and 7th causes of action, both class and individual.

[5] Plaintiffs suggest for the first time in their reply brief that drug testing is only a proper subject for collective bargaining if the union members are employed in safety-sensitive job positions. However, even putting aside plaintiffs' forfeiture of this argument by failing to raise it earlier, contrary to rules of appellate procedure, plaintiffs direct us to no case or other authority holding that the right to bargain for drug testing is reserved for employees holding only certain safety-compromised job positions. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Accordingly, we address it no further.

II. Orders Sustaining Demurrers or Granting Summary Adjudication: 5th, 9th, 10th, 11th, 12th, 13th, and 14th Causes of Action (Class and Individual)

We review de novo the trial court's rulings to sustain Recology's demurrers without leave to amend and to grant summary adjudication as to the 5th, 10th, 11th, 12th, 13th, and 14th causes of action. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

In reviewing summary adjudications, the appellate court reviews the lower court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.) In reviewing orders to sustain a demurrer without leave to amend, we " 'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

A. Plaintiff Hunter's Retaliation Claim (FEHA) (11th Cause of Action)

Plaintiffs brought a retaliation claim on behalf of individual plaintiff Hunter[6] pursuant to FEHA (Gov. Code, § 12900 et seq.), which bars an employer from taking any adverse employment action against an employee because the employee expresses, by

[6] In the third amended consolidated complaint, the 11th cause of action was brought as to Hunter and Daniels. On appeal, however, plaintiffs only challenge the trial court's ruling as to Hunter.

word or conduct, opposition to any practice forbidden under the act. (Gov. Code, § 12940, subds. (h), (k); Cal. Code Regs., tit. 2, § 11021.)[7] We begin with the facts relevant to this claim.

Hunter was employed by Recology as a Material Handler at the 501 Tunnel Avenue facility from February 2009 to November 2010. In January 2010, Hunter was randomly selected for drug testing and tested positive for marijuana, a banned substance under the substance abuse policy. Hunter, who had a valid California medical marijuana prescription, executed a return to work agreement and served a three-month suspension, during which he attended five counseling sessions. Hunter successfully returned to work May 4, 2010.[8]

On April 4, 2010, during his three-month suspension, Hunter filed a charge with the Equal Employment Opportunity Commission, alleging his random selection for drug testing was racially motivated due to his African-American background.

On October 18, 2010, Hunter presented and collected signatures at the 501 Tunnel Avenue facility for a petition requesting proof from Recology that its drug testing program was in fact random in selection. At 3:00 a.m. the next morning, Hunter visited the Pier 96 facility (although at the time he worked solely at the 501 Tunnel Avenue facility) to collect additional signatures for this petition. Later that day, Hunter delivered this petition to the human resources office. Hunter would not tell management or security at the Pier 96 facility the reason for his presence at that early morning hour.

According to the on-duty supervisor, Lynise Sanders, when she approached Hunter to tell him to move his improperly parked vehicle and to ask whether he had checked in with security, he yelled at her: " 'FUCK SECURITY,' they can't tell me I can't be here and neither can you. I work for this fucking company." (*Sic.*) Hunter then

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[7] Former section 7287.8 of title 2 of the California Code of Regulations was renumbered as section 11021 without regulatory effect in 2013.

[8] Like other union members, Hunter received the 60-day written notice in 2009 that Recology's substance abuse policy was going to be enforced as to non-DOT-regulated union members in safety-sensitive positions.

repeatedly warned Sanders to "watch [her] back" and called her a "dirty low down bitch" for turning on "[her] own kind" (an apparent reference to the fact both Sanders and Hunter are African-American). After Hunter continued yelling at her and calling her obscenities, Sanders went through with her warning to call the police. The police advised her to immediately obtain a restraining order against Hunter, which would authorize them to arrest him if he returned to the work site.

Sanders also alerted two company security guards on duty that night of the situation. One of these guards later prepared a written account of the event for Recology, in which he described Sanders as "visably [*sic*] distraught" and stated that Hunter "became aggresive [*sic*] in manner" and "got up in [Sanders's] face, yelling [at] her things like 'watch your back – you fat ass'd bitch! Your [*sic*] going down bitch! And fuck security – I don't have to check in with no one! You racist bitch![']" The other guard stated in writing to Recology that Hunter yelled at Sanders: "Bitch I will get you fired just like I did [human resources manager] Molly [Inglemon] & [plant manager] John [Jon Jurinek] is next!"

Shortly thereafter, Hunter was suspended pending an investigation after meeting with Recology's general manager, Michael Crosetti. During this meeting, Hunter explained to Crosetti that he had been collecting signatures at the Recology site on the night in question in protest of Recology's substance abuse policy because he believed participants were not randomly selected. This was the first time Crosetti learned Hunter was protesting this policy. Hunter warned Crosetti if his dispute with respect to the policy was not resolved, he would take further steps—"like an anaconda slowly tightening around [Crosetti's] neck," and that "[Crosetti] would get what was coming to [him]." Crosetti, in turn, provided Hunter with a letter detailing 10 allegations against him for violations of corporate conduct policy and invited his response. Hunter later submitted his response with assistance from counsel in the form of a 10-page letter that detailed his opposition to the substance abuse policy, including his belief that it was a

discriminatory tool used against African-Americans.[9] Hunter also denied threatening Sanders or causing a scene, stating that she overreacted, and yet he admitted telling her, "Ain't that a bitch, you would call the police on your own people," and telling the security guard, "If you want to know my name, here it is big boy."

Based on the security guards' written statements, his own interview of Hunter, Hunter's recent suspension for misconduct, and Hunter's 10-page written response, Crosetti concluded his conduct on the night in question qualified as threatening and intimidating and, thus, discharged him on November 3, 2010, for violating Recology's code of conduct.[10] Crosetti denied his decision to discharge Hunter was in any way influenced by Hunter's opposition to the substance abuse policy. Hunter subsequently testified that he found Crosetti to be a "good person," who had done nothing offensive aside from giving him the termination letter.

Meanwhile, Hunter unsuccessfully arbitrated his claim that the substance abuse policy's selection process was not random, and also filed a charge with the National Labor Relations Board protesting the policy on the same ground.

The trial court dismissed Hunter's retaliation claim on preemption grounds, reasoning that his claim is based upon alleged conduct arguably protected or prohibited by the National Labor Relations Act (29 U.S.C. § 151 et seq.) and, alternatively, on the ground that plaintiffs failed to meet their burden to establish a triable issue of fact as to pretext once Recology produced evidence of a legitimate basis for its adverse actions against Hunter. The following legal principles govern our de novo review of this issue.

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[9] Recology's Employee Reference Guide prohibits and identifies as grounds for discharge "workplace violence," including "threats or acts of violence or behavior that causes a reasonable fear or intimidation response that occurs: [¶] On Company premises. . . ." "Prohibited conduct," which is also grounds for discharge, includes: "Using inappropriate or abusive language at any time during working hours or while on premises owned, occupied or operated by Recology[.]"

[10] Hunter had been suspended three months earlier for having a physical altercation with another employee.

To establish a prima facie case of retaliation under FEHA, the employee must show that he or she was engaged in a protected activity, that the employer subjected the employee to an adverse employment action, and that a causal link exists between the protected activity and the employer's adverse action. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1125.) Once the employee has made this prima facie showing, the burden shifts to the employer to articulate one or more legitimate non-retaliatory reasons for the adverse action, and, if the employer does so, the employee then has the opportunity to show the employer's reason(s) was untrue or pretextual. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475–476.)

Here, plaintiffs do not deny Recology produced substantial evidence that it had legitimate business grounds for its decisions to suspend and terminate Hunter. Nor could they. As set forth above, there is ample evidence that Hunter violated norms and policies of corporate conduct by verbally attacking and threatening Sanders in the early morning hours of October 19, 2010. Sanders's statements describing Hunter's verbal abuse and threatening demeanor were not denied by him in a 10-page responsive letter he submitted to Recology and, moreover, were independently corroborated by the two on-duty security guards. Moreover, just a few months earlier, Hunter had been suspended by Recology for unrelated acts of violence in the workplace. And Hunter himself acknowledged the individual who actually made the decision to suspend him, Crosetti, was "a good person" about whom "I can't say nothing [*sic*] bad," an acknowledgement that belies any retaliatory motive. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 ["ultimate issue is . . . whether the employer acted with a motive to discriminate illegally," italics omitted].)

Plaintiffs nonetheless argue on appeal they met their burden to produce substantial responsive evidence that Recology's adverse employment actions were untrue or pretextual, pointing to evidence that Hunter's suspension and termination occurred during a time period during which he was actively organizing against and expressing opposition to the substance abuse policy. However, this "temporal proximity" argument, in the absence of any evidence or indication of retaliatory animus by any individual in

Recology actually involved in his suspension or termination, does not suffice to overcome the summary adjudication against him. (See *McRae v. Dept. of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 397 [reversing judgment in the employee's favor in an employment retaliation case where the employer produced evidence the employee's termination was a reasonable management decision and the employee thereafter failed to "demonstrat[e] such weaknesses, implausiblities, inconsistencies, incoherencies, or contradictions as to allow the jury to find it unworthy of credence"]; accord, *Martin v. Lockheed Missiles & Space Co*. (1994) 29 Cal.App.4th 1718, 1735.)

As aptly explained by our colleagues in the Third Appellate District, a "plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations. [Citations.] [Rather, a] plaintiff's evidence must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and termination." (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 433–434, 436 [the "mere fact that UPS found plaintiff had breached its integrity policy shortly after returning to work [from a four-month leave of absence] is insufficient to raise an inference" that he was discharged for discriminatory reasons]; accord, *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 862.)

Accordingly, for the reasons stated, we conclude there is no reasonable inference to be drawn that Recology suspended and then terminated Hunter because of his statements and actions opposing the substance abuse policy and not because of its investigation confirming Hunter had repeatedly violated corporate policy against workplace violence. We thus affirm the trial court's ruling on this ground and need not inquire into whether Hunter's claim is preempted under the National Labor Relations Act.

B. Plaintiff Daniels's Discrimination/Accommodation Claims (FEHA) (5th Cause of Action)

Plaintiff Daniels, a diabetic, was hired by Recology as a Classifier in 2008. In the third amended consolidated complaint, Daniels alleges his diabetes was a motivating factor contributing to his suspension from employment in 2010 pursuant to Recology's drug testing policy after he failed to submit a urine sample of sufficient volume to be accurately tested. He further alleges that, prior to his suspension, Recology failed to engage him in an interactive process in order to find a reasonable accommodation for his physical disability. As a result, Daniels asserts, his FEHA rights were violated. The following facts are relevant.

Before Recology's drug testing program was extended to non-DOT-regulated, unionized employees, Daniels advised his supervisors he was diabetic. At that time, although Daniels did not ask for any accommodation for his condition, his supervisor authorized additional breaks as needed, an accommodation Daniels acknowledged he never needed.

In May 2010, Concorde randomly selected Daniels for drug testing. Daniels had been advised in 2009 about Recology's substance abuse policy, including the policy's term that refusal to test is deemed a failed test, and did not complain when selected. On May 24, 2010, Daniels attempted to give a urine sample. Despite drinking four or five 16-ounce bottles of water, Daniels's sample at the end of the mandated three-hour window was "[n]ot much at all," a symptom, he later explained, resulting from his diabetes.[11] Thus, his sample was ultimately insufficient for testing purposes, and he was deemed to have failed the test per the testing policy.

Concorde thereafter asked Daniels for a medical explanation of his "failed" test, and Daniels was thus evaluated by Dr. Brad Moy of Saint Francis Medical Center. After an extensive evaluation of Daniels's physical and psychological health, Dr. Moy

[11] DOT regulations require the testing individual to provide 45 milliliters (or 1.52 ounces) of urine within three hours. (49 C.F.R. § 40.193(a), (b)(4).)

concluded, "There [was] not an adequate basis for determining that a medical condition has, or with a high degree of probability, could have, precluded the donor from providing a sufficient amount of urine [for substance abuse testing] . . . ." Dr. Moy provided this conclusion to Concorde's medical review officer, Dr. Arthur Schatz, who advised human resources in writing that Daniels had failed the test. Daniels was informed of this result at a meeting, and was also informed that, per Recology's substance abuse policy, he was being suspended. At no time during this meeting did Daniels inform the human resources representatives that he was diabetic or that his diabetes had led to the failed test. Nor did Daniels submit his own medical opinion letter indicating that he had been unable to provide an adequate urine sample for drug testing purposes due to his diabetes.

Daniels thereafter executed a return to work agreement and served a three-month suspension, during which he was seen five times for counseling by Dr. Jones, who worked with him to, among other things, quit smoking. Daniels was reinstated on September 8, 2010 without loss of seniority and continued working during the course of this lawsuit.

Following discovery and a contested hearing, the trial court summarily adjudicated Daniels's disability discrimination and accommodation claims in Recology's favor, finding no triable issue of fact as to whether he was suspended from employment because he was diabetic. Specifically, the trial court found, inter alia, that Recology had produced evidence of one or more legitimate business reasons for suspending him (to wit, his failed drug test), which Daniels did not counter by demonstrating a triable issue of material fact that these reasons were in fact pretextual or untrue. (See Code Civ. Proc., § 437c, subd. (p)(2) [a defendant meets its burden of showing a cause of action has no merit by demonstrating a complete defense to the cause or by demonstrating one or more of its elements cannot be established; once the defendant meets this burden, plaintiff has the burden to demonstrate a triable issue of material fact exists].) We agree with the trial court's findings and conclusion.

"[Government Code] Section 12940 makes it an unlawful employment practice to discharge a person from employment or discriminate against the person in the terms,

conditions or privileges of employment, because of physical or mental disability. (§ 12940, subd. (a).) The FEHA 'does not prohibit an employer from . . . discharging an employee with a physical or mental disability, . . . where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations . . . .' (§ 12940, subd. (a)(1).) The term 'reasonable accommodation' includes '[j]ob restructuring, . . . reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities.' (§ 12926, subd. (n)(2).)" (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 242.) Whether an employer provided a reasonable accommodation is generally a question of fact. (*Fuller v. Frank* (9th Cir. 1990) 916 F.2d. 558, 562, fn. 6.)

On appeal, plaintiffs dispute the trial court's finding that there was no material evidence that Recology's reasons for suspending Daniels were pretextual by pointing to the facts that he did in fact submit a urine sample and that he did not test positive for drugs, yet was suspended anyway. These facts do not prove pretext. First, while Daniels offered evidence his supervisor knew he was diabetic well before he was selected for testing, Recology produced unchallenged expert medical evidence that Daniels did not have a medical condition that, "with a high degree of probability, could have precluded [him] from providing a sufficient amount of urine." Daniels offered no evidence to the contrary, expert or lay, aside from his own speculation, which is not competent evidence. (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161 ["When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork"].) Recology's drug testing protocol, adapted from DOT regulations and disclosed to Daniels before he was selected for testing, provides that where, as here, an inadequate sample is submitted, the test is deemed a failed test notwithstanding that no banned substance was detected. Given this employee-wide protocol, Daniels's "showing"—that he took the test and did not test positive—does not overcome Recology's showing that it had legitimate grounds to suspend him. (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1045–1046 [affirming

summary judgment in part where the plaintiff failed to offer substantial evidence of pretext to overcome the defendant's showing of legitimate business reasons].)

Plaintiffs also argue that Recology never offered any reasonable accommodation during the drug testing process, such as the option to submit blood or hair, despite his difficulty providing a valid urine sample. Yet Daniels admitted he never requested any accommodation whatsoever from Recology with respect to the testing procedure (such as a blood or hair test), a prerequisite for proving a failure-to-accommodate claim under FEHA. (See *King v. United Parcel Service, Inc.*, *supra*, 152 Cal.App.4th at pp. 442–443 [where an employee is disabled, " 'the employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless it establishes through undisputed facts that (1) *reasonable accommodation was offered and refused*; (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith' "].) An " ' "employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation . . . ." ' " (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252–1253.)

Moreover, as to Daniels's retaliation claim, as we just explained, Recology's evidence proves that, after his failed test, Recology arranged for Daniels to have a comprehensive medical exam, after which Dr. Moy opined that Daniels's medical condition was not the likely cause of his failure to provide a sufficient amount of urine to produce a valid test. Dr. Moy gave this medical opinion to Concorde's medical review officer, who, with Kathleen Jamison from the human resources department, relied upon the opinion to conclude he should be suspended for "refusal to test (shy bladder) without medical explanation." Thus, because there is no evidence in this record that Recology suspended Daniels *because of his diabetes*—a fundamental requirement of his FEHA claim (Gov. Code, § 12940, subd. (a))—Recology's duty to accommodate Daniels's

diabetes by altering the drug testing procedure in his case was not triggered. (See *Avila v. Continental Airlines, Inc.*, *supra*, 165 Cal.App.4th at p. 1252.) Accordingly, there is no basis to reverse the trial court's ruling on this issue.

C. Plaintiffs Hunter & Daniels's Retaliation Claims (Lab. Code, § 1102.5) (12th Cause of Action)

Hunter and Daniels also allege Recology violated Labor Code section 1102.5, subdivision (c) by retaliating against them for complaining about Recology's drug testing program, which they say is a "protected activity" under California law. The trial court dismissed their claims for several reasons, including the lack of evidence that they refused to participate in the activity complained of (to wit, drug testing), a necessary element of a section 1102.5, subdivision (c) claim. Having reviewed the relevant record, we agree with the trial court.

Section 1102.5, subdivision (c) provides: "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee *for refusing to participate in an activity that would result in a violation* of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation." Here, as the trial court found, Daniels and Hunter have not alleged any facts demonstrating their refusal to take part in the allegedly unlawful drug testing program. On the contrary, it is undisputed that Daniels and Hunter participated in the drug testing, as well as in the drug treatment counseling and follow-up testing required by the return to work agreement each executed after his failed test and suspension. This circumstance warrants dismissal of their claims. (*Mayo v. Recycle to Conserve, Inc*. (E.D.Cal. 2011) 795 F.Supp.2d 1031, 1047 [granting the defendant's summary judgment motion where "Plaintiff has not presented evidence that he refused 'to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation' "].)

Plaintiffs respond with a legal argument—that *subdivision (b)* of section 1102.5 does not require a showing of refusal to participate in an unlawful activity; rather, it requires a showing of complaining about an unlawful activity. Yet a fundamental

problem with this argument remains: The operative complaint raises a section 1102.5, subdivision (c) claim, not a subdivision (b) claim, alleging that "in direct violation of Labor Code Section 1102.5(c) [Recology] did retaliate against [plaintiffs] for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation to wit: suspicion-less drug testing." (Underscoring omitted.) Recology has no burden to defeat a claim that has never been plead. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499; see also *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332–333 [theories not pleaded by plaintiff need not be addressed by defendant moving for summary judgment].)

And even assuming for the sake of argument Daniels and Hunter did or could plead a section 1102.5, subdivision (b) claim, there is no allegation, much less evidence, in this case that either man complained to Recology management or the union about the drug testing *before* being selected for testing (Hunter) or being suspended (Daniels), a concession that defeats any basis for proving causation, a required element of the claim. (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1125 [a prima facie case of retaliation requires a showing that the plaintiff was engaged in a protected activity, that he was subjected to an adverse action by the employer, and that there is a causal link between the two].) Hunter attests that he expressed disapproval of the drug testing program as early as July 2009, months before he tested positive; however, there is no evidence in this record that he spoke or wrote to anyone in management or the union (much less spoke or wrote to any person involved in the decision to suspend or terminate him) about his disapproval. Daniels, in turn, states quite generally in his summary adjudication papers that he had complained in the past to his supervisors "regarding safety, inequality in the workplace, and the unfair treatment he felt he received after lodging such complaints throughout 2009." These broad assertions, however, are not evidence sufficient to defeat summary adjudication that he complained about the activity he alleges in this case to be unlawful—Recology's drug testing program. (*Ibid.*)

Accordingly, plaintiffs have failed their burden to affirmatively prove error on appeal as to the court's dismissal of their 12th cause of action.

D. Plaintiffs' Claim of Violation of the Bane Act (13th Cause of Action)

All plaintiffs assert a claim under the Bane Act (Civ. Code, § 52.1) (section 52.1). This statute authorizes an action for damages and attorney fees against anyone who "interferes . . . or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state . . . ." (Civ. Code, § 52.1, subds. (a), (b).) As the California Supreme Court has explained, section 52.1 "does not extend to all ordinary tort actions because its provisions are limited to threats, intimidation, or coercion that interferes with a constitutional or statutory right." (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843.) In this case, the allegedly interfered-with right was plaintiffs' exercise of their right to privacy and, more specifically, to be free from suspicionless drug testing or mandatory drug treatment counseling under California's laws and Constitution. As such, plaintiffs' assertion that Recology interfered with their exercise or enjoyment of a right within the meaning of the Bane Act presupposes plaintiffs *have* a constitutional or statutory privacy right to be free of suspicionless drug testing and mandatory drug treatment counseling. And as we have already concluded (at pp. 7–12, *supra*), whether they have such a privacy right can only be determined by resort to the CBA and LOU, a matter reserved for federal law under section 301. Thus, plaintiffs' Bane Act claim, as asserted in the 13th cause of action, suffers the same fate as their other privacy right claims asserted in the 4th and 7th causes of action—federal preemption. (See *Caterpillar*, *supra*, 482 U.S. at p. 394 [section 301 preemption exists where claims are founded directly upon rights conferred in the CBA or claims are "substantially dependent on" interpretation of the CBA terms]; *Jackson*, *supra*, 863 F.2d at pp. 119–122 [dismissal of state law invasion of privacy claims affirmed on preemption grounds where "the dimensions of appellant's cognizable expectation of privacy depend to a great extent

upon the concessions the union made regarding working conditions during collective bargaining"].)

Moreover, as the trial court found, even assuming for the sake of argument this claim was not subject to preemption, it would fail for another reason: Plaintiffs failed to demonstrate a material triable issue of fact that Recology used violence or force, threat of violence or force, or coercion to interfere with their exercise or enjoyment of any constitutional or statutory right to privacy. While plaintiffs insist the law does not require actual violence or threat of violence of physical force, as our colleagues in Division Two explain: "Civil Code section 52.1 does 'require an attempted or completed act of interference with a legal right, accompanied by a form of coercion.' (*Jones v. Kmart* (1998) 17 Cal.4th 329, 334 [70 Cal.Rptr.2d 844, 949 P.2d 941]; see also *Venegas v. County of Los Angeles*, *supra*, 32 Cal.4th at p. 843 [section 52.1 'provides remedies for "certain misconduct that interferes with" federal or state laws, if accompanied by threats, intimidation, or coercion'].)" (*City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408.) And here plaintiffs have not alleged and the record does not establish any conduct by any individual at Recology that rises to the level of violence, coercion or intimidation, or the threat thereof. On the contrary, the record reflects that Recology adopted and implemented a drug testing process that, among other things, required plaintiffs to submit to testing and, after failing the test, to agree to certain return to work terms (including mandatory mental health counseling) or face termination. This is just the sort of permissible corporate policy in place at many places of employment. Notwithstanding that plaintiffs opposed or suffered certain negative or undesired consequences from this policy, the policy does not, without more, resort or amount to a threat or use of force, coercion, or intimidation by Recology against its employees. Accordingly, plaintiffs' 13th cause of action for violation of the Bane Act was appropriately rejected.

E. Plaintiffs' Forced Medical Exam Claim (FEHA) (9th Cause of Action)

Next, we turn to plaintiffs' FEHA claim for illegal forced medical examination. The trial court found in granting summary adjudication as to this cause of action that,

one, neither the drug testing nor the drug treatment counseling sessions required under the return to work agreement following a failed test qualify as "medical examinations" prohibited under FEHA and, two, plaintiffs' execution of the return to work agreements bars their forced medical examination claim. We agree with both findings.

As the California Supreme Court explains, employer-mandated medical examinations and drug testing are matters of both federal and state law. First, "the ADA [Americans with Disabilities Act] establishes a rather detailed scheme regulating employer-required medical examinations, prohibiting such examinations at some stages of the application and employment process, but specifically permitting an employer, at the post-offer/pre-hiring stage, to require such medical examinations of all applicants without any showing that the examination 'is . . . job-related and consistent with business necessity.' (42 U.S.C. § 12112(d)(4)(A).) [¶] . . . [A]lthough the ADA places some significant limitations upon the circumstances under which an employer may require current employees or applicants for employment to undergo medical examinations, the act contains a specific provision declaring that '[f]or purposes of this subchapter, *a test to determine the illegal use of drugs shall not be considered a medical examination*' (42 U.S.C. § 12114(d)). The legislative history of the ADA and the administrative regulations promulgated pursuant to the act also make clear that the ADA was not intended to restrict an employer's use of drug testing to determine whether an applicant for employment or a current employee is currently engaging in the illegal use of drugs." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 864 (*Loder*), italics added.)

"At the state level, the question of employer-required medical examinations is addressed explicitly in an administrative regulation that was adopted to implement a provision of [FEHA], prohibiting discrimination in employment on the basis of physical or mental disability. (See Gov. Code, §§ 12935, subd. (a), 12940.) . . . [L]ike the ADA, the FEHA specifically provides that 'the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a mental [or physical] disability' for purposes of the provisions of the act prohibiting discrimination on the basis of mental or physical disability (Gov. Code, § 12926, subds. (i), (k)), and *nothing in the FEHA, or*

any other California statute, purports to prohibit, or place general limitations upon, employer-mandated drug testing." (*Loder*, *supra*, 14 Cal.4th at p. 865, italics added.)

Thus, both state and federal law do not equate drug testing with a medical examination, and do not prohibit or place general limitations on the right of an employer to mandate drug testing for its employees. Moreover, we find nothing in these state or federal legal schemes prohibiting an employer's use of mandatory substance abuse counseling for those employees failing a drug test under circumstances, present here, where the counseling is offered to promote a safe and productive work environment and, more significantly, where the employee agrees in writing to the counseling in exchange for the right to return to work.

Indeed, FEHA expressly authorizes psychological or physical examination of a current employee in order to inquire into the ability of the employee to perform job-related functions where the examination is consistent with business necessity. (Gov. Code, § 12940, subd. (f)(2) ["Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite"].) Moreover, requiring drug treatment counseling for employees, like plaintiffs, who fail random drug tests and who perform job-related functions that involve handling potentially dangerous items and equipment falls squarely within this provision—plaintiffs make no showing to the contrary.

And we conclude this is particularly true given that those plaintiffs found in violation of the drug policy themselves executed return to work agreements—the legality of which they do not directly challenge. In these agreements, they specifically accepted mandatory counseling (as well as follow-up drug testing) in exchange for the right to continue their employment. There is nothing inherently suspect about this quid pro quo. (See *Mararri v. WCI Steel, Inc.* (6th Cir. 1997) 130 F.3d 1180, 1182 [affirming summary judgment in employer's favor in a retaliation case where the employee was terminated for

testing positive in violation of his "last chance agreement," and pointing out that, "[w]hile this was not a company-wide policy, [plaintiff] accepted this term when . . . he bargained to be reinstated to his position after violating the company-wide policy of not being intoxicated while at work"]; *Ames v. Home Depot U.S.A., Inc*. (7th Cir. 2011) 629 F.3d 665, 670 [affirming summary judgment against plaintiff in an FMLA case after concluding "first, the requirement to take a blood alcohol test was in accordance with the terms of [employer's] Employee Assistance Agreement to which [plaintiff] agreed; and second, the termination occurred only after [employer] learned that the test result was positive, which was a terminable violation under the Assistance Agreement and [the employer's] Code of Conduct"].)

Accordingly, for the reasons stated, we agree with the trial court Recology was authorized to mandate drug treatment counseling and retesting for employees, like plaintiffs, testing positive for prohibited substances in order to enforce its substance abuse and drug-free workplace policies given the serious potential consequences to health, safety and productivity of having in the workplace employees affected by these substances. Plaintiffs failed their burden to raise any material triable issue in dispute of this fact and, as such, their claim was properly disposed of on summary adjudication.

F. Failure to Prevent a FEHA Violation (10th Cause of Action)

In a variation of their previous argument, plaintiffs contend Recology is liable for having failed to prevent a FEHA violation by subjecting them to "forced medical testing." The law, however, is clear that no liability for failure to prevent a FEHA violation exists where, as we have already concluded here (at pp. 26–29, *supra*), there is no FEHA violation in the first place. (*Trujillo v. North County Transit Dist*. (1998) 63 Cal.App.4th 280, 289 [" '[T]here's no logic that says an employee who has not been discriminated against can sue an employer for not preventing discrimination that didn't happen, for not having a policy to prevent discrimination when no discrimination occurred . . . .' Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were

not prevented"].) Accordingly, plaintiffs' 10th cause of action was properly dismissed on summary adjudication.

G. Declaratory Relief (14th Cause of Action)

Lastly, we quickly address plaintiffs' remaining claim for declaratory relief, which is wholly derivative of their already disposed-of class and individual claims. Simply put, plaintiffs have failed to establish that Recology violated any law. Accordingly, as plaintiffs concede by failing to argue otherwise, they have not established any right to relief, whether in the form of damages or declaratory relief.

III. Cross-appeal.

Recology brought a cross-appeal that was wholly protective in nature, meaning Recology sought review of the trial court's grant of class certification in this case should we reverse any of the rulings on demurrer or summary adjudication. Accordingly, because we find no error in the trial court's rulings disposing of each and every remaining cause of action, Recology's cross-appeal is moot and need not be considered herein. For all the reasons set forth above, the judgment is affirmed.

DISPOSITION

The judgment is affirmed.

_____
Jenkins, J.

We concur:

_____
Siggins, P. J.

_____
Pollak, J.*

A141999/*Daniels v. Recology, Inc.*

* On Monday, November 26, 2018, the Commission on Judicial Appointments confirmed the Governor's appointment of Justice Pollak as the Presiding Justice of Division Four of this court.